IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-408

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,

Petitioner,

vs.

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR., TIMOTHY E. MORGAN,

Claimants-Respondents,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

BRIEF OF AMICUS CURIAE NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY.

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STATEMENT OF INTEREST OF AMICUS CURIAE.

This *Amicus Curiae* Brief is filed on behalf of the Newport News Shipbuilding and Dry Dock Company (hereinafter Newport News Shipbuilding), a division of Tenneco. Newport News Shipbuilding is the largest shipyard in the world employing 26,000 people. The Shipyard has delivered ten of the last fourteen nuclear powered ships built for the United States Navy since 1974. It is the only shipyard capable of servicing and building the full range of Navy nuclear vessels. By the end of 1977, the Shipyard will deliver to the Navy two more nuclear

submarines, one nuclear aircraft carrier and a nuclear guided missile cruiser. The Shipyard will deliver more tonnage to the Navy in 1977 than all United States shipyards did in 1975. In addition, the Shipyard is a leader in ship repair and commercial new construction. From the beginning of 1977 until September 15, 1977, three ships had been delivered, three had been launched and the keels of four more had been laid.

Newport News Shipbuilding employees are engaged in every aspect of the shipbuilding industry, including many supporting services which are not directly related to the construction of ships. It is also engaged in many activities having no connection with shipbuilding. Some of these employees, if injured, are entitled to coverage under the Longshoremen and Harbor Workers' Compensation Act (hereinafter the LHWCA), while other employees are entitled to coverage under the Virginia Workmen's Compensation law. Since the *Amicus* is self-insured, it is directly responsible for payments under both of the above acts. In 1976, Newport News Shipbuilding paid benefits in the amount of $1,008,000.00 under the LHWCA and in the amount of $585,000.00 under the state act.

Any decision by this Court as to the application of the LHWCA to shipbuilding activities will have a direct and substantial economic impact upon this *Amicus* as well as the entire shipbuilding industry throughout the United States. Because of the absence of a definitive determination by this Court of the extent of application of the LHWCA to shipbuilding, this *Amicus* has been unable to determine whether a particular injury incurred by an employee should be compensated under the LHWCA or under the state act. Consequently, this *Amicus* has incurred substantial penalties, interest charges and liability for claimants' attorneys' fees in contesting the jurisdiction of the LHWCA before Administrative Law Judges, the Benefits Review Board and the Fourth Circuit Court of Appeals.

At the present time, the *Amicus* has two cases pending before the Fourth Circuit Court of Appeals which are directly concerned with the jurisdiction of the LHWCA.

In *Willie A. Graham* v. *Newport News Shipbuilding and Dry Dock Company* (77-2297) (4th Cir.), the claimant was employed as a "chipper" in a land based "sub-shop" where he removed temporary attachments from items under construction by other employees. The claimant did not assemble any component part of a ship. The items on which the claimant worked were removed from the "sub-shop" by other employees to locations where other employees would assemble these items to construct a vessel. The claimant did not at any time perform his work duties on a vessel and in fact the sub-shop is located 1200 feet from the James River, the nearest navigable waters. The claimant sustained a back injury while performing these activities and he was awarded benefits by the Administrative Law Judge who also assessed penalties, interest charges and attorney's fees against Newport News Shipbuilding. The award was affirmed by the Benefits Review Board.

In *George E. Jones* v. *Newport News Shipbuilding and Dry Dock Company* (77-1100) (4th Cir.), the claimant was employed in a foundry as a mechanic's helper. The claimant was required to grease and oil various machines located throughout the foundry. He did not have anything to do with manufacturing any products. The foundry manufactures castings for the shipyard and for another subsidiary corporation of Tenneco, Inc. having no relation to shipbuilding. The foundry is located approximately 3,000 feet from the water's edge. The claimant was not at any time required to perform any work duties on a vessel. The claimant sustained a shoulder injury for which he received an award from the Administrative Law Judge who also assessed penalties, interest charges and attorney's fees against Newport News Shipbuilding. The Benefits Review Board affirmed the award.

The *Amicus* contends that the decision in *Graham, supra,* and *Jones, supra,* are clearly erroneous and since it is highly likely that this *Amicus* will present substantially the same issues to this Court in a Petition for Certiorari in the event of an adverse

decision entered against the *Amicus* in the *Jones* and *Graham* cases, and since a decision by this Court favorable to Ingalls Shipbuilding Corporation would be dispositive of the issues in *Jones* and *Graham*, the interests of justice and judicial economy would best be served by granting the Petition for Certiorari in this case.

The *Amicus* contends that the decision of this Court in *Northeast Marine Terminal* v. *Caputo, I. T. O.* v. *Blundo*, ... U. S. ....., 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977), did not resolve the crucial issue in the present case and in numerous cases confronting this *Amicus*, namely, the extent of the application of the LHWCA to the employees and activities of the shipbuilding industry.

The *Amicus* has obtained the written consent of all parties in interest in the present action prior to submitting its Brief.

Accordingly, Newport News Shipbuilding and Dry Dock Company prays that it be allowed to submit its Brief as Amicus Curiae for the Court's consideration of the instant Petition for Certiorari.

ARGUMENT.

The 1972 Amendments—The Coverage of Shipbuilders—The Problem of Terms Never Defined.

In 1972, the Congress enacted P. L. 92-572 amending the LHWCA. The issues before this Court and the problem confronting this *Amicus* are the threshold issues concerning jurisdiction over who are persons engaged in maritime employment and where those persons so engaged are injured.

In determining whether a particular employee who sustains an injury is within the coverage of the LHWCA it is necessary to consider two separate definitions within the Act.

The first defines the *status* which the affected employee must occupy in order to bring his injury within the coverage of the Act:

> "[t]he term 'employee' means any person engaged in maritime employment, including any Longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. * * *"[1]

The second defines the *situs* wherein a covered employee's injury must occur:

> "[c]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[2]

The problem which exists in the foregoing language is that the term "shipbuilding" is never defined in either the LHWCA or the legislative history of the 1972 amendments.[3]

It is the position of this *Amicus* that a workable and logical definition of the term "shipbuilding" has been adopted by one federal agency and that a further refinement of that definition which would resolve all the issues in this case has been adopted by at least one federal court.

To resolve the definitional issue of "shipbuilder" by simply indicating that a shipbuilder is one who builds ships begs the question. In the abstract sense, at least, it can be said that anyone who forms a part of a ship is a shipbuilder.

The term "shipbuilding," as it is commonly understood in the industry, has a definition that is precise and applicable to this case. This definition is set forth in safety and health regulations for the shipbuilding industry promulgated by the Occupational Safety and Health Administration:

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1. 33 U. S. C. § 902(3).
2. 33 U. S. C. § 903(a).
3. 1972 U. S. Code Cong. and Adm. News 4698, *et seq.*

> The term 'shipbuilding' means the construction of a vessel, including the installation of machinery and equipment.[4]

However, if the definition of shipbuilding which has been adopted by OSHA was to be adopted by this Court as the all-inclusive definition of shipbuilding, then the litigation in this area would simply shift from what constitutes shipbuilding to what constitutes construction. Therefore, it is respectfully submitted that the definition of construction, as it relates to shipbuilding should further be refined.

The term "construction" as it relates to shipbuilding has been defined as:

> [t]he process * * * by bringing together—correlating—a number of independent entities, constructing a definite entity; and this process is construction."[5]

Simply stated, the construction of a ship is the putting together of the parts that form that ship, or as the court noted in *The Dredge A, supra,* the bringing together and correlating of a number of independent entities.

This definition is in accord with a common sense understanding of the definition of construction. Accordingly, a shipbuilder is one *who brings* together and correlates a number of independent entities so as to form a definite entity. To hold otherwise, the 1972 Amendments would serve to not only extend the shipyard area covered under the LHWCA to maritime employees as was intended, but would also result in an enlargement and extension of the definition of maritime employment which was not intended. For example, an employee working in the foundry or tool and die shop of an employer engaged in shipbuilding and who manufactures or works on a part which is ultimately incorporated into a ship is not a maritime employee. A more extreme example would be of an employee performing this same function in a plant of the same employer located amid the wheat fields of Kansas where the parts worked on are subsequently

4. 29 CFR 1916.2(i).

5. *The Dredge A,* 217 F. 617, 631-632 (E. D. N. C. 1914).

shipped to Newport News, Virginia for incorporation into a ship. In each example, it is submitted that neither the foundry worker nor tool and die maker comes within the definition of maritime employee under the LHWCA.

The job of a shipbuilder has another aspect. By definition he is an *amphibious* worker. As this Court has clearly pointed out:

> "[t]he Act (LHWCA) focuses primarily on occupations—longshoreman, harbor worker, ship repairmen, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to *these amphibious workers* who, without the amendments, would be covered only for part of their activity. (Emphasis added.)[6]

In *Jacksonville Shipyard Inc.* v. *Perdue*[7] the Court of Appeals for the Fifth Circuit held that a worker who was injured while building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned was within the coverage of the LHWCA. The court pointed out that though most of his work was performed off of the ship, a necessary and integral part of his work required him to go on board vessels to take measurements, or to install or repair some woodwork. The court went on to note that even though a fellow employee would have sometimes installed an item which the injured employee was building when he was injured, the only reasonable conclusion was that the injured employee was directly involved in an ongoing shipbuilding operation.

This reasoning is consistent with the definitions of shipbuilding and construction which have been advanced by the *Amicus.*

In accord with this view and highlighting a distinction between maritime and non-maritime workers, the Court of Appeals for

6. *Northeast Marine Terminal Co.* v. *Caputo, ITO* v. *Blundo,* ..... U. S. ....., 97 S. Ct. 2348, 2362, 53 L. ed. 2d 320, 338 (1977).

7. *Jacksonville Shipyard Inc.* v. *Perdue,* 539 F. 2d 533 (5th Cir. 1976), *cert. denied, sub. nom., Halter Marine Fabricators, Inc.* v. *Nulty,* 45 U. S. L. W. 3838 (U. S. June 27, 1977).

the Ninth Circuit, in denying coverage under the LHWCA to a sawmill worker, stated:

> "[w]e find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as 'maritime employment' in the traditional sense. Neither do we believe that a bayside location or situs of a sawmill with its partitioned salt water log pond in any fashion changes the universal and customary nature of the pondman's work and *ipso facto* engages him in 'maritime employment.' "[8]

CONCLUSION.

The *Amicus* submits that the reasoning of the Ninth Circuit Court of Appeals in *Weyerhauser Company* v. *Gilmore*,[9] should guide this Court in determining these crucial issues. As that Court stated:

> "[i]n expanding the maritime situs element of the Act, however, *Congress clearly did not intend to broaden the class of covered employees to include anyone injured in an adjoining area.*" (Emphasis added.)[9]
>
> "We join the observation of the Law Judge that the intent of Congress in extending the Act was not to 'open the doors' to all employees, but to minimize the adverse effect of a shoreside location or situs when a *maritime* employee is injured."[10]

Implicit in the court's statement is that the 1972 amendments were designed *to extend the act only to maritime employees engaged in maritime work while ashore.*

The Ingalls Shipbuilding Corporation and Newport News Shipbuilding and Dry Dock Company as *Amicus* submit that the Office of Worker's Compensation Programs and Administrative Law Judges of the Department of Labor have consist-

8. *Weyerhauser Company* v. *Gilmore*, 528 F. 2d 957, 961-62 (9th Cir. 1975), *cert. denied*, ... U. S. ....., 97 S. Ct. 179 (1976).

9. *Id.* at 960.

10. *Id.* at 961.

ently ruled that non-maritime employees not engaged in shipbuilding who are injured ashore are covered under the LHWCA. This position is inconsistent with the intent of Congress when it adopted the 1972 amendments.

Wherefore, Newport News Shipbuilding respectfully requests this Court to grant *certiorari* to the Ingalls Shipbuilding Corporation and to allow Newport News Shipbuilding to participate in this matter as *Amicus Curiae*.

Respectfully submitted,

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